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Project Number: 287111261-001
File Number: SDAB-D-18-171

Notice of Decision

[1] On October 24, 2018, the Subdivision and Development Appeal Board (the "Board" or "SDAB") heard an appeal that was filed on October 2, 2018. The appeal concerned the decision of the Development Authority, issued on September 18, 2018, to refuse the following development:

Change the use from a Health Service to Cannabis Retail Sales

[2] The subject property is on Plan 4575S Blk 12 Lot 9, located at 9629 - 82 Avenue NW, within the CB2 General Business Zone. The Main Streets Overlay and Strathcona Area Redevelopment Plan apply to the subject property.

[3] The following documents were received prior to the hearing and form part of the record:

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer's written submissions;
- The Appellant's written submissions; and
- A submission from an Affected Property Owner.

Preliminary Matters

[4] At the outset of the appeal hearing, the Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties.

[5] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*Municipal Government Act*").

[6] It was confirmed that the Postponement request submitted by the property owner of 9612 – 82 Avenue has been withdrawn.

[7] Mr. A. Bolstad, one of the Board members, disclosed that he has been serving as Civics Director for the Ritchie Community League since May, 2018. He confirmed that the

Ritchie Community League has not dealt with or taken a position regarding this issue. Mr. Bolstad only became aware of it two days ago in preparation for the hearing.

[8] Mr. Bolstad also disclosed that he used to work with the Edmonton Federation of Community Leagues (EFCL) and is currently volunteering to help them with their 100th anniversary project. An executive with Fire and Flower had offered to make a donation to this project which has not been accepted. It has been EFCL's policy not to accept donations from tobacco and liquor related businesses. A committee has been set up to determine if a donation from a cannabis related business would be acceptable.

[9] The Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

Summary of Hearing

i) Position of the Appellant, K. Wakefield, Denton's

[10] Mr. Wakefield appeared on behalf of the Appellant, Fire and Flower. He was accompanied by Ms. T. Jamison and Ms. D. Parenteau, both of Fire and Flower.

[11] Mr. Wakefield referred to the certification from Northland Surveys under Tab 9 of his submission which confirms that the distance from the closest point of the boundary of the subject site to the closest point of the boundary of the school site is 199.07 metres. He is therefore withdrawing his first ground for appeal which stated:

> The actual distance between the boundary of 9629— 82 Avenue and Mill Creek Public School is more than 200m rather than the 199m ascribed to it by the City.

[12] He is requesting the Board to use its discretion under Section 687(3)(d) of the *Municipal Government Act* to grant a variance of 1 metre in the required separation distance between a Cannabis Retail Sales and a school.

[13] The Appellant advised that Ms. J. Agrios of Kennedy Agrios LLP is appearing as legal counsel in Court of Queen's Bench this morning on behalf of Item 9 Inc. to seek a writ of mandamus requiring the City to issue a Development Permit for a Cannabis Retail Sales Use to Item 9 Inc. at a location across the street. Although the subject site was specifically mentioned in the Originating Application, Fire and Flower were not provided with any notification of these court proceedings. Mr. Wakefield only became aware of these proceedings through the City lawyer last week.

[14] Ms. K. Cherniawsky, the Chair, disclosed that she has known Ms. Agrios for several years and sees her occasionally in a social setting. She has not discussed any appeal cases with her in the last several years. No objections were raised by any of the parties to Ms. Cherniawsky's presence on the Board.

[15] Fire and Flower placed No. 165 in the City's lottery system for a Cannabis Retail Sales while Item 9 Inc., who rent the premises across the street at 9612 – 82 Avenue, were drawn as No. 220. The court application is to force the City to grant a permit to Item 9 Inc. because Cannabis Retail Sales is a Permitted Use at that location and no variances of any kind, including to separation distance, are required.

[16] Mr. Welch, the Development Officer, has told the Board that the City's position regarding the sequence of the cannabis lottery draws should be honoured throughout the appeal process to the SDAB. Where there is a separation distance issue, the Development Officer cannot grant variances. The SDAB has that jurisdiction; therefore, the earlier draw should be able to avail itself of its appeal rights.

[17] The current situation is that there is competition between two applicants for a Cannabis Retail Sales Use permit across the street from each other. The first one to get the permit will subject the other applicant to the 200 metre separation distance requirement between competing cannabis stores. It is Mr. Wakefield's opinion that this is what motivated Mr. Jankowski (owner of the proposed Item 9 development site) to seek a postponement of today's hearing. This Postponement request has now been withdrawn.

[18] Mr. Wakefield then addressed the merits of the appeal by summarizing the contents of his written submission.

[19] **Tab 1**

Charter Bylaw 18387 amends the *Edmonton Zoning Bylaw* by adding a new Special Land Use Provision for Cannabis Retail Sales as Section 70. Section 70.2 stipulates that Cannabis Retail Sales shall not be located less than 200 metres from any Site being used for public education and defines how this separation distance shall be measured. No variance power was given to the Development Officer to reduce this required separation distance.

[20] **Tab 2**

Contains a report from City Administration to Council supporting Charter Bylaw 18387 and states "Walkable commercial areas (main streets, downtown) are desirable for cannabis stores." This report also provides the reasoning for recommending a 200 metre separation distance between cannabis stores and schools. Several maps indicate that the subject site is located within an area that was considered to be a potential location for a cannabis store by Council.

[21] **Tabs 3 and 4**

Contains extracts from the Gaming, Liquor and Cannabis Act and Regulations. Mr. Wakefield confirmed that the proposed Use at this location complies with all of the requirements of this Provincial legislation. There are much stricter rules in place for cannabis stores than for liquor stores.

[22] **Tab 5**

Contains a copy of Section 11 of the *Edmonton Zoning Bylaw* which outlines the variance powers of a Development Officer.

[23] **Tab 6**

Contains a copy of Section 687(3)(d) of the *Municipal Government Act* which states:

> In determining an appeal, the subdivision and development appeal board may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
>
> (i) the proposed development would not
>
> (A) unduly interfere with the amenities of the neighbourhood, or
>
> (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,
>
> and
>
> (ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

The proposed development is for a Permitted Use in the CB2 General Business Zone. Council has already decided that Cannabis Retail Sales Use is generally acceptable for this location.

The Board only has the deficiency in the 200 metre separation distance to deal with. In this case, a deficiency of 0.93 of a metre to the property line from the school to the property line of the subject property is essentially *de minimus*. This is less than a yard.

[24] **Tab 7**

A copy of the Development Permit application under this tab confirms there is a deficiency of 1 metre in the required Setback from a public education facility (Mill Creek School).

[25] **Tab 8**

The map under this tab shows the strip of commercial zoned CB2 General Business Zone which is located to the west of the Mill Creek Ravine along both sides of 82 Avenue. The area zoned CB2 General Business Zone goes for several blocks along the south side of 82 Avenue and is much more compressed on the north side of the Avenue. The proposed development is shaded in grey.

[26] **Tab 9**

A letter and map from Northland Surveys confirming the distance from site to site between the proposed development and Mill Creek School is 199.07 metres. It is another 63 feet 3 inches from the back corner of the subject site to the start of the building. In practical terms, you have to walk around the building to the front of the store as there is no access from the rear – this distance is well over 200 metres. If the subject building was one store over to the east there would be no issue.

[27] **Tab 10**

Contains an extract from the City of Edmonton *Cannabis Legalization and Implementation* outlining the following site requirements:

- No customer access from a lane
- Storefront provide transparency
- Exterior lighting
- Low growing shrubs or high canopy trees

[28] **Tabs 11 to 13**

Contains:

- Photos providing context of the area including a Google overhead view of the surrounding commercial area and street views showing the immediately surrounding buildings as well as a close up of the subject building.
- Renderings showing proposed high end finishes for the storefront and interior drawings.

[29] **Tab 14**

Contains a previous decision of the SDAB (SDAB-D-18-133) where the Board used its discretion as per Section 687.3(d) of the *Municipal Government Act* to grant a variance in the minimum required separation distance as they found no harm.

[30] In summary, Mr. Wakefield requested the Board grant a variance of 0.93 metres to the minimum required separation distance for the following reasons:

a) The proposed development is not visible from the school. There are several blocks separating the proposed development from the school with houses and other structures in between the two sites.

b) In its report to City Council, administration indicated that walkable commercial areas are desirable for Cannabis Retail Sales. The proposed location fits this description.

c) It is significant that there are no objections to the proposed variance from any of the property owners within 60 metres of this site. Also, the Development Officer, Mr. Welch, realizes that the requested variance is *de minimus* and not something that is of great concern to the City, otherwise he would be here today. He simply provided a standard written submission with a suggestion that the Board exercise caution.

d) A 0.93 metre variance is not unreasonable as neighbours are already used to having a commercial area next to them.

e) The only complainant is a competitor.

[31] Ms. Parenteau of Fire and Flower, District Manager, Northern Alberta, provided the following overview to give a feel for the culture of the business:

a) Clients will not be permitted to use the back door. It will only be used by staff for shipments.

b) There will be a two point contact system for checking the age of customers. Minors will never be permitted past the vestibule as ID will be checked right at the door. It will also be checked at the time of purchase. Fire and Flower will refuse to make a sale to anyone if they believe the product will end up in the hands of a minor.

c) They want to conduct a safe business and will close at 10:00 p.m. daily with shorter hours on Sunday.

d) They plan on having community events and give-backs that would involve the Ritchie community in a positive way. They have already approached a couple members of the Ritchie Community League and received positive feedback.

[32] Mr. Wakefield referred the Board to a photo of Item 9's building under Tab 3 of the supplementary materials.

[33] The Appellants provided the following responses to questions from the Board:

a) The Appellants have no issues with any of the suggested conditions of the Development Officer.

b) The probability is that no decision will be rendered this morning regarding the court action as it would take more than 20 minutes to argue the issues. Item 9's Counsel has not applied for any sort of injunction to prevent this Board from carrying on as per usual. The postponement request has been withdrawn and Item 9 itself has not asked that the SDAB defer this decision.

c) Ms. Jamison of Fire and Flower advised they were not aware of the 200 metre separation distance requirement when they purchased this property; they were only aware of the AGLC requirements. The title search under Tab 9 of their submission shows the transfer of land to Fire and Flower Inc. took place on January 18, 2018. This is six months before the 200 metre separation distance was passed by the City of Edmonton on June 12, 2018. They only found out about the 0.93 metre deficiency when they applied for the Development Permit.

d) The walking distance from property corner to property corner is 272.3 metres as opposed to the 199.07 distance "as the crow flies".

e) Mr. Wakefield suggested that the Board could request that it be advised in writing of the outcome of this morning's court proceedings.

ii) Position of the Development Officer, I. Welch

[34] The Development Authority did not attend today's hearing and the Board relied on Mr. Welch's written submissions including submission of legal counsel.

iii) Position of Affected Property Owners opposed to proposed development

[35] Mr. M. Howe and Mr. J. Clark appeared to represent the property owner of 9612 – 82 Avenue. They signed a 5 year lease with this property owner in April, 2018, to operate a Cannabis Retail Sales. If Fire and Flower's application is approved, their site is sterilized.

[36] They selected this property as they knew all other potential properties in the area would be in breach of the required separation distance, including the property now owned by Fire and Flower.

[37] They read the following submission below (unedited) to the Board in which references are made to a tabbed binder of photographs and documents and added some additional comments. A copy of the binder was provided to Mr. Wakefield as well as the Board.

Introduction

Thank you, Mr. Chair and other members of the board for giving me the chance to speak to you.

- My name is Marynek Howe. My partner, Jeff Clark, and I established a corporation last winter, Item 9, and are currently leasing a commercial property in the Mill Creek area with the hope of opening a cannabis store. In the spring, we signed a 5year lease with our landlord for that purpose.
- Today I am speaking on behalf of our landlord Tadeusa (John) Jankowski as an affected party, as he has asked that we be his agent. His commercial property is close to the property that is the subject of this appeal.
- Fire and Flower submitted an application for a development permit at this location, and was refused the permit because the proposed site is too close to a school.
- The address for Fire and Flower's site is 9629 82 Avenue, and our address is 9612 82 Ave. The sites are approximately 68 metres apart. TAB 1 shows a map of our respective locations.
- If Fire and Flower's appeal is successful, Item 9's application will be refused as our site would fall within the "sanitized zone" of 200 metres created by Fire and Flower.
- I will come back to the history between our application and Fire and Flower's application later on, because it is important, even if peripheral.

The Law

- The City of Edmonton bylaw 12800 does not allow the Development Officer to grant any variances of this nature when the proposed cannabis retail outlet is too close to the Escuela Mill Creek School located at 9735 80 Avenue. The SDAB does have the authority to grant a variance. Under section 687(3) of the *Municipal Government Act.*

687(3) In determining an appeal, the subdivision and development appeal board

> ……d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
>
> > (i) the proposed development would not
> >
> > > (A) unduly interfere with the amenities of the neighbourhood, or
> > >
> > > (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,

- The case of *Thomas v. Edmonton* 2016 ABCA 57 from the Court of Appeal is important.
- Paragraph 24 emphasizes the importance of the planning and development of land as being consistent with community values. Paragraph 24 reads: *It is evident from a review of Part 17 of the Act that its purpose, that is object, is to regulate the planning and development of land in Alberta in a manner as consistent as possible with community values. In so doing, the Legislature has struck an appropriate balance between the rights of property owners and the larger public interest inherent in the planned, orderly and safe development of lands.*
- Paragraph 26 stresses the importance giving municipalities broad discretion in how land should be developed in their communities. In interpreting the statutory variance powers that the Alberta Legislature has conferred on the SDAB under s 687(3)(d) of the *Act*, a critical point is this. Every subdivision and development appeal board in Alberta *must* comply not only with Alberta's land use policies but also with the relevant municipality's statutory plans and, with one exception, land use bylaw. By doing so, the Alberta Legislature has recognized the desirability of granting municipalities considerable scope in determining the terms and conditions under which land may be developed in their communities.
- In its first decision regarding the granting of a variance for a cannabis retail location (SDAB-D-18-133 the board wrote at paragraph [11]: *The Court of Appeal determined in Thomas v. Edmonton (City), 2016 ABCA 57, that Statutory Plans and land use bylaws set out general development standards that are common to all lands in a specific area. These standards are typically defined with precision so that everyone understands what a particular site can be used for. However, it is recognized that there will be cases in which a strict application of the set standards could lead to an unreasonable result. To relieve against hardship, the Legislature has conferred on Subdivision and Development Appeal Boards the authority to relax — that is vary, dispense with or waive development standards in the applicable land use bylaw providing certain conditions as set out in s.*

687(3)(d) of the Municipal Government Act are met. This provides the Board with direction on how to deal with unique situations.

- A number of principles come from the cases: 1) The SDAB should exercise its discretion in a way that is consistent with community values. 2) The SDAB should give a lot of weight to the bylaws the City of Edmonton has chosen to adopt. 3) SDAB should vary If a strict application of the rules leads to an unreasonable — some cases have said a ridiculous — result. 4) The SDAB should look at the hardship the applicant might suffer as a result of an unreasonable application.
- The SDAB has said in the past that contravention of the bylaw creates a "presumption of harm". Fire and Flower bears the burden of rebutting that presumption and showing that the variance is warranted
- Courts have said that the SDAB should be cautious about over-extension in its power to grant variances.

Escuela Mill Creek School

- The school is Escuela Mill Creek School, a school within the Edmonton Public School Board. It is and elementary school and over 300 children attend. TAB 2 is a picture of the school taken from the northeast corner of the school grounds at the intersection of 80 Avenue at 97 Street. The next picture is taken from the same spot but looking toward Whyte Avenue. The green porta-potties are the entrance to the alley way that lead to the rear of Fire and Flower's site, as well as daycare. Playground speeding signs can be seen in the pictures.
- We have walked the distance between the school and Fire and Flower's proposed location. The school is two blocks south of Whyte Avenue. The route between the school and the proposed site is residential, primarily single family dwellings. Other than the retail outlets on Whyte Avenue, there are no other businesses.
- The playground attached to the school is in use, and children were seen to be playing there when we attended.
- There is no large arterial roadway separating the school from the cannabis site.
- The bylaw requires that there be a separation distance of at least 200 metres, measured from the closest property line to the closest property line between the two. We recognize that Fire and Flower's site is not under by much. But it is under. Our understanding is that it is 199.07 metres away. Should the variance be granted because the variance is so small? No. We don't think so.
- In the Summary of Federal and Provincial Priorities and Principles at TAB 3, the Federal government's policy objectives identify as the first priority "1) Protect young Canadians by keeping cannabis out of the hands of children and youth". That same document identifies the Province's priorities: "The Alberta Cannabis Secretariat developed policy priorities based on the federal objectives. The four policy priorities for cannabis legalization, as summarized in the Albert Cannabis Framework, are as follows: 1. Keeping cannabis out of the hands of children and youth."
- Alberta Health Services recommended to City Council that cannabis retail outlets should be 300 metres from schools and daycares, see email at TAB 4.
- The City of Edmonton requested a Public Engagement Survey and that was presented to the City Urban Planning Committee on April 3rd to assist in developing their bylaws. That

survey showed that 68% of respondents were concerned about the proximity of children to cannabis stores.

- 17% wanted cannabis shops 200 metres from schools; 59 percent wanted cannabis shops MORE than 200 metres from schools. This document is at TAB 5
- Edmonton has chosen the distance of 200 metres from schools, but other jurisdictions have made the distance even greater.
    - TAB 6 shows a comparison of different jurisdictions, which have separation distances up to 300 metres. Edmonton's separation distance is a relatively liberal one at 200 m., not unduly impacting the ability of cannabis stores to open.

The following comments were made regarding the submission to this point

a) Mill Creek School is currently under renovation.

b) They paid for the Northland's Survey that was referenced by Mr. Wakefield.

c) They are concerned that children from the daycare associated with the school would be exposed to people smoking cannabis in the back alley of the proposed development as they make their way from the school to the daycare.

…… Submission Continued

Mill Creek's Finest Child Care

- There is a daycare that has been approved to open two lots to the west of Fire and Flower at 9639 82 Avenue. The distance between the two is 10 metres. TAB 7
- See SDAB decision SDAB-D-18-145 found at TAB 8
- The daycare will serve children aged 13 months to 12 years, to a maximum capacity of 150. There will be a senior room, a kinder room, and an out of school care room. Many of the children in the after-school care room and the kinder room will be coming from the Escuela Mill Creek Elementary School, See TAB 9 for a description.
- Daycare workers will accompany the children both to and from school on the short walk.
- There will be regular traffic of children at this location.
- There will be events coordinated with Mill Creek School.
- While the children will not pass the proposed cannabis shop on their way to or from school, the daycare has, further to the SDAB decision, entered into discussions with Sai Baba spiritual centre — a church located nearby — for parking while parents pick up and drop off the children. This parking lot is 3 lots to the east of Fire and Flower's proposed site. Children and parents will pass by Fire and Flower either by front access to the daycare, or through the alley, where cannabis users may well be consuming marijuana. Refer to TAB 10.
- By law, the daycare is required to have an outdoor play space. That play space will be in the back adjacent to the alley.
- Bylaw 12800 has now designated a 10 metres distance from entrances as a non-smoking zone.

- There is a narrow alley from the Front of Fire and Flower along the east wall of their premises that leads to the back alley. It is likely that, because cannabis users cannot consume marijuana close to entrances, they will move to the back alley — likely via that pathway — and consume marijuana. See TAB 11 (article from Edmonton Journal)
- There have already been community concerns about this pathway, as can be noted in a community member's submission to the SDAB for the child care facility.
- The location of the required outdoor space of the daycare will be around 10 m from where it can be expected users will be consuming marijuana.
- Attached at TAB 12 is information from Alberta Policy Coalition regarding the harmful effects to children. These include not only physical effects, but also the effects of being exposed to cannabis consumption.
- The City chose not to include daycares as a sensitive use location. But that doesn't mean that having a daycare that is affiliated with the school two doors away from the cannabis shop is irrelevant. It is linked to the school's population.
- It should be pointed out that while the City of Edmonton did not include daycares, many jurisdictions have done so. TAB 6. This should be a consideration in the SDAB's decision.
- At TAB 13 I have attached letters of support from the daycare manager, the owner, the supervisor, the director, several child care workers and staff, and a number of prospective parents. They are not in support of a variance for this application.

Community Support

- My partner and I canvassed the business community in the location where both Fire and Flower and Item 9 propose to open cannabis retail stores. Virtually all were concerned about the proximity to a school and concerned about the variance.
- We were forthright with everyone that we were competitors and hoping to open a store in the vicinity as well. We received positive feedback from these community leaders. We were supported because 1) We were not too close to a school and would not require a variance; 2) because a local, small business is more in keeping with the character of this neighbourhood and 3) because small businesses provide greater economic benefits to the community.
- At TAB 14 We have attached letters of support from approximately a dozen businesses in the area. We told these businesses we would keep their opposition confidential from Fire and Flower to avoid conflict if Fire and Flower were granted their appeal.
- At TAB 15 we have included a letter of support from Jean Johnson, Executive Director of the French Quarter, designated a Business Improvement Area by the City of Edmonton.

The following comments were made regarding the submission to this point

a) The City has made it clear it wants transparency in windows. Children would be able to see transactions being carried on inside the premises.

b) They clarified that French Quarter goes all the way to 99 Street and includes both sides of 82 Avenue

……Submission Continued

Hardship

- Fire and Flower have argued that the request for a variance is marginal, particularly given the time and money they have invested in this location.
- Our view is that strict application of the bylaw is not unreasonable in this case.
- Our view is that Fire and Flower was aware that the site was too close to the school and opted to assume the risk.
- When my partner and I were searching for commercial premises to lease, we looked at everything that was available — including the site which Fire and Flower purchased. That site was also available for lease at the time.
- Without a stable of lawyers and other professionals, we were able to determine the distance using the tools of Google maps, and were aware that the proposed site was too close to Mill Creek School. As a small business, we were aware that the site would likely be refused because it was non-compliant and we were not willing to take that risk. We simply do not have the resources to invest on speculation as do many of the large corporations eyeing the same business ventures.
- We also considered other locations in the area, and were satisfied that there did not appear to be any other vacant sites that could make an application that would be compliant to compete for the same general area.
- We signed a lease for 5 years. I believe that Fire and Flower may have purchased their building within days of our signing the lease.
- The City of Edmonton indicated that it would be conducting a lottery system for the processing of applications, and we had received information that subsequent applications would not be processed until the avenues of appeal were exhausted for those drawn first.
- We were so concerned about this process that we attended a planning and information session on April 19, and then subsequently addressed City Council on May 7.
- My presentation to City Council is located at TAB 16.
- In that presentation, I indicated that a competitor — a corporate chain — was applying to set up across the street, and too close to a school. I indicated that if that their application was drawn first in the lottery, our (fully compliant) application would have to await the outcome of their appeals.
- I said, in that presentation: *"Why process everyone 's expression of interest equally if some are better qualified, while others are submitting applications on the off chance that such regulations can be overwritten. This punishes the companies that did their very best to comply with the proposed restrictions and guidelines. Not only would we feel that we were being treated unjustly, but also that the city would be doing itself a disservice by lengthening the time for everyone involved and spending more money to process businesses that have been negligent, but who can afford to gamble with their applications."*
- Trevor Fencott, CEO of Fire and Flower was also at that meeting. Not realizing that we were speaking about Fire and Flower, he essentially endorsed the comments that I had made, and insisted that Fire and Flower was compliant with all of its applications. Excerpts of his comments are located at TAB 17. The full video of the presentation is contained on the USB provided.
- City councillors seemed sympathetic to our position and pressed Fencott on the issue that large corporations could take more risks. It was acknowledged that Fire and Flower had put in the maximum number of applications possible for Alberta. Fencott emphasized that their locations were completely compliant.

- At that meeting the following exchange took place:
    - Councillor Ben Henderson: So what happens to one that goes through that entire process with the province and has had to sign a lease in order to get it, only to find out that we're going to say no because they, you know, now they're out of pocket sitting on a property they have nothing they can do with.
    - Trevor Fencott: Well that is an interesting question, and the smaller player, as well as ourself, both made sure ours were completely compliant. We, this is not a mystery. The zoning distances from schools, best of breed, best practices, are well-established. Not just in Canada, they are well-established distances. That's why we agree with the policy decision in that sense. So we've already done our homework, and he's done his homework, and we will be fine.
- Another exchange took place with Councillor Sarah Hamilton at the Urban Planning Committee Meeting on May 22: **(this audio / video clip was played at the hearing)**
    - *Councillor Hamilton: They can 't get final approval from AGLC until they get all the municipal ducks in a row. One of the things I've heard is that of those sort offirst step licenses that have been applied for, up to 40 percent are not going to be permitted under our separation distances. So it might be for naught for a lot of people who have already gone for those licenses, is that not correct?*
    - *Trevor Fencott: I think that would be correct for people who perhaps haven't done their homework. The people who we 've talked to, they've actually done that, and in our case, for example, we used the most conservative estimates on any, any jurisdiction that done legalization in terms (if distances from schools, anticipating that safety, public safety is going to be a key concern.*
- Even if Fire and Flower is given the benefit of the doubt and were simply negligent in not determining their distance from the school previously, they were aware by June. The City Map was posted in June 2018 showing the sensitive use overlays. Inserting the address for Fire and Flower returned a result of "Use not Permitted". The diagram of the area showed a "bite" out of the south west.
- On July 3, 2018, we noticed that there was a change. While a visual of the map still showed that the southwest comer of their lot was still too close to the school, inserting the address for the retail location now showed "Use Permitted". We asked the City why the status had been changed, and were advised that the map was not to be considered 100% accurate, and that the change had been made in response to stakeholder input, presumably Fire and Flower.
- That they would continue construction and development in the face of that information was their assumption of risk. It seems unfair that they should benefit from their choice to continue to put money into development knowing that their proposed site was too close to a school.

The following comments were made regarding the submission to this point

a) According to the above audio, even the CEO of Fire and Flower does not believe that any variance should be granted.

The Appellants moved on to the next topic at page 7 of their written submission.

SDAB Cannabis-Related Appeals

- Almost all municipalities are taking a cautious approach with respect to the regulation of cannabis stores.
- One of the primary concerns is to protect kids, and to limit their exposure to cannabis.
- We've reviewed all of this Board's decisions in the last few months regarding cannabis, and while this board has granted some variances, a variance in this particular case really would be precedent-setting, and a departure from the previous decisions. Those cases are distinguishable.
- This board has varied the requirements for distance from sensitive use areas — parks, schools, playgrounds.
- But all of those are distinguishable
- Several cases related to sensitive areas other than schools, such as parks and ravines.
- SDAB-D-18-134. The Application was refused by a Development Officer because the proposed cannabis retail site was less than 100 m. from the MacKinnon Ravine Park.
    - [Para 16] Newcastle Centre G.P. Ltd. V. Edmonton 2014 ABCA 295. In that case at paragraphs 6 and 7, the Court of Appeal explains that the SDAB has a power to grant variances, "but the bylaw creates a presumption of harm to the public, and we, the Board cannot intervene unless the presumption is rebutted by the Applicant."
    - The distances were described in [Para 23-30] "Boundary to boundary is 38 m distance from the edge of the building to the tip of public land. 93 m distance as the crow flies between site and paved entrance to ravine is 188. Walked distance from the store to the ravine is 300 metres. The store is 450 m of travel away from the paved entrance of the ravine. The ravine is generally unkempt with tall grass.
    - There are no public picnic tables or playgrounds in this part of the ravine.
    - It is a passive area not used for community or recreational activities. There is no actual park or activity area. No playing fields or an open area picnic. The retail outlet can't be seen from the ravine. The ravine is separated by 149 Street --- a 6 lane arterial highway. No children or youth gather or play in the ravine. The park area is essentially a bush or forest area with a steep incline.
    - The SDAB granted the variance. That made sense.
- In the case SDAB-D-18-152 The proposed retail outlet was within 100 metres of a public pathway, and secondly, a forested pathway, not a park)
    - The Board said that parks like this were not considered to be as vulnerable as schools in the bylaw, that's why only a 100 metre distance was required.
    - The SDAB granted the variance — but they described these particular sites. They were essentially pathways. There was a pathway with heavy foliage that led to Groat ravine. There were no children's activities, and no children were observed. The sites were typically used as pathways for commuting by employees, and for smoke breaks. There was a bench at the location with a makeshift ashtray.
    - The SDAB noted that no one appeared at the hearing to object.
- In another case, SDAB-D-18-149 The proposed retail location was 123 metres from a public library and 75 metres from a park area. The SDAB did not grant a variance.
- SDAB-D-18-143. The development officer refused the application by Jupiter on Whyte Avenue because the retail space was 183 m. from Old Scona School. The applicant argued that legal lot line to legal lot line was 202 metres, and from the lot line to the actual school

was 202 metres. The applicant further argued that the closest part of the school building to the closest part of the retail building was 328 metres. The applicant argued that the City calculates distance "as the crow flies", and does not consider the true physical distance of separation of sites created by buildings or other physical barriers.
    - The Board said the Development Officer was correct in calculating the distance "as the crow flies", from closest point to closest point as that is what the bylaw requires.
    - The appeal was dismissed.
- Two appeals with respect to what might be called schools were granted. Both of those are very different from this case.
- SDAB-D-18-133 — Development officer refused the cannabis retail application because the location was too close to the Amiskwaciy High School that is located in the old municipal airport. When measured boundary site to boundary site, the distance between the proposed location and the school was 73 metres. But that was because the airport lands extend well beyond the physical location of the school. It is the largest parcel of land in the City of Edmonton. The proposed site is 393 metres from the actual school. There are no school grounds for the students. Between the two sites, there are two hotels, a parkade, and industrial zoned area, and a 6 lane divided arterial highway.
    - The SDAB granted the appeal.
    - [Para 54] As determined by the Court of Appeal decision in Thomas, the application of a general principle to unique circumstances sometimes leads to a ridiculous result. Consistency should not be achieved at the expense of good sense.
    - [Para 55] It is the responsibility of the Applicant to persuade the Development Authority that a variance can be granted because the test in s. 687 has been met. In this case, the use, value and enjoyment of neighbouring properties will not be negatively impacted by allowing this permitted Use or the variance required.
    - [Para 56) "section 687(3) of the Municipal Government Act...the test is whether or not granting the variance will be unduly impactful on the neighbourhood and neighbouring properties, and in this case the setback is so large that it cannot possibly have a negative impact.
- Finally, a variance was granted to a proposed retail site that was closer than 200 metres to the Learning Store located on Whyte Avenue. While the Learning Store had some aspects of a school, it was not zoned as an educational facility, but as an administrative and professional building. In fact, if it had been classified as a school, it would not have been properly zoned to operate on Whyte Avenue, The SDAB allowed the appeal, noting that the Learning Store had not been classified as a school or other sensitive site for the establishment of liquor stores, and that this approach was inconsistent.

Summary

- There is a reason for the separation distance between schools and cannabis retail outlets. The distance in the bylaw — 200 metres — is not unreasonable. Many jurisdictions have greater distances.
- The ONLY reason here to vary is that they are not in breach by much. There are no other reasons.
- This is a school, in a residential area. The lot sizes for the school as well as for Fire and Flower are average-sized. Many of those students will attend a daycare two doors down from

Fire and Flower. Their play area will be in the alley where cannabis smokers are likely to congregate. To drop off and pick up their children, parents will park in a church lot and have to pass by Fire and Flower.

- Was the refusal unreasonable? Not at all. That's exactly what the separation distances are there for.
- Should the SDAB relieve Fire and Flower of hardship as a result of the refusal? Our view is that they were aware that they were too close to the school, despite telling the Planning Committee and City Council that they were fully compliant with all of their applications, and they knowingly took their chances at securing a variance at this level, because deep pockets can do that.
- And fairness? Because of the lottery process established by the City, Fire and Flower was processed first. But more than that, The City refuses to process our application until Fire and Flower gets a chance to appeal, even though we are fully compliant, and have invested lots of money ourselves. And even if holding off on our application means that they are now in contravention of the timelines set up in the *Municipal Government Act*.
- I see no unfairness to Fire and Flower.
- Finally, while I recognize that thrust of this appeal is the distance to the school, it is relevant as well that we are supported by the local business community as a small business that is more in keeping with the character of the neighbourhood.
- In conclusion, The SDAB can grant a variance if the proposed development would not

    (A) unduly interfere with the amenities of the neighbourhood, or

    (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

- In our view neither of those conditions has been met, and we would ask this Board to dismiss the appeal.

[38] Mr. Howe and Mr. Clark provided the following responses to questions from the Board:

a) The variance of 0.93 metres affects them because they have signed a lease at 9612 – 82 Avenue. They did their due diligence in selecting this location and it is inconceivable to grant a variance to a company when a fully compliant store exists across the street.

b) The value of the neighbourhood is negatively affected if more corporate chains come in. Neighbouring property owners are not in favour of a corporate chain even if they are fully compliant as the managers of a small local business are more invested in the community.

c) Their proposed location is more suitable as it is further from the school, patrons of the daycare and school would not be walking past their storefront and people smoking in the alley behind their premises would not be visible to children.

d) They referred to the letters of support from daycare workers and clients, surrounding businesses and the Executive Director of the French Quarter contained in their written submission. They confirmed that the daycare is not yet in operation as it was just approved by the SDAB a few weeks ago (SDAB-D-18-145).

e) The play area of the daycare is located across the alley from Fire and Flower. This raises a concern if people are smoking in the alley. The number one priority of Federal and Provincial legislation is to keep cannabis away from children. Item 9's development is further away and these concerns are significantly reduced.

f) They did not speak with owners of the residential properties in the area.

iv) Rebuttal of the Appellant

[39] Ms. Jamison of Fire and Flower clarified that according to AGLC requirements, no one is permitted to see through the windows of a Cannabis Retail Sales location. They will apply a film glazing to all of the front windows.

[40] While Mr. Wakefield acknowledges Item 9 on the thoroughness of their submission, he believes it strayed in terms of relevance and contains much speculation and supposition. Most of the concerns raised regarding the Fire and Flower location would also apply to Item 9's proposed store.

[41] While he can understand Item 9's frustration with the lottery result, the City's position is you have to live with the results of the lottery. The next steps are to carry it forward through the Development Officer and then to this tribunal.

[42] Character evidence and larger corporations versus small businesses are not relevant considerations.

[43] This is a Permitted Use and the Board has the authority to grant a variance to the separation distance if the tests under Section 687(3)(d) of the *Municipal Government Act* have been met which is the case here.

[44] The issues regarding health concerns and criminalization have been resolved at other levels of government. The underlying philosophy behind legalizing cannabis is to stop drug deals from taking place in the lanes.

[45] Most of the form letters are more in support for Item 9 rather than objecting to the Fire and Flower premises. Nobody appeared in opposition to the proposed development other than a competitor saying a 93 centimetre variance is going to cause harm to the community.

[46] It is also notable that the Development Officer is not here advocating turning down the requested variance.

[47] City Council has indicated in its maps and zoning that this is an appropriate area for this type of use. While the proposed location is technically off-side by a fraction, the way the store is actually accessed, its location, orientation and lack of visibility from the school are all factors he asks that the Board take into consideration when considering the granting of the required variance.

[48] The Appellants provided the following responses to questions from the Board:

a) He was not aware of the daycare that had recently been approved by the Board.

b) Fire and Flower do not support having smokers in the lane at the rear of their property and will do everything possible to stop this including considering hiring a security person if necessary. Most mature areas of the City have lanes behind their property. This location is no different from many other locations.

c) There will be lighting at the rear of the premises; this is part of the security package.

d) Mr. Wakefield confirmed he had not yet heard anything regarding this morning's court proceedings.

Decision

[49] The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED as applied for, subject to the following CONDITIONS as recommended by the Development Authority:

1. The Cannabis Retail Sales must commence operations within nine (9) months of the date of issuance of this Development Permit.

2. Exterior lighting shall be developed to provide a safe lit environment in accordance with Sections 51 and 58 and to the satisfaction of the Development Officer.

3. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51 of the Edmonton Zoning Bylaw 12800).

NOTES:

1. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the *Edmonton Safety Codes Permit Bylaw* or any caveats, covenants or easements that might be attached to the Site.

2. The Development Permit shall not be valid unless and until the conditions of approval, save those of a continuing nature, have been fulfilled; and no notice of

appeal from such approval has been served on the Subdivision and Development Appeal Board within the time period specified in subsection 21.1 (Ref. Section 17.1).

3. Signs require separate Development Applications.

4. The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this Development Permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.

5. This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.

[50] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:

a) The minimum required 200 metres separation distance between the Cannabis Retail Sales Site and a School Site (Mill Creek School) pursuant to Section 70(2) is reduced by 1.0 metres to permit a minimum allowed separation distance of 199.0 metres.

Reasons for Decision

[51] The proposed development is to change the Use from a Health Services Use to a Cannabis Retail Sales Use.

[52] Cannabis Retail Sales is subject to regulations under the *Gaming, Liquor, and Cannabis Regulation*, AR143/96. Section 105 deals with the locations of premises described in a cannabis licence and distances between those premises and certain other premises.

[53] Based on the Appellant's submissions, the Board finds that requirements of those regulations have been satisfied and it has met section 687(3)(a.4) of the *Municipal Government Act* (the "*Act*") which requires that in making this decision, the Board must comply with those requirements.

[54] The Subject Site is located in the CB2 General Business Zone. Pursuant to section 340.2(6) of the *Edmonton Zoning Bylaw* (the "*Bylaw*"), Cannabis Retail Sales is a Permitted Use in this Zone.

[55] Cannabis Retail Sales is subject to Special Land Use Provisions in section 70 of the *Bylaw*. Sections 70(1),(2) and (3) set minimum separation distances applicable to Cannabis Retail Sales. Based on the evidence before the Board, the proposed

development complies with all of the required separation distances, save the distance required to a Site containing an elementary school (the School Site):

> 70(2) Any Site containing a Cannabis Retail Sales shall not be located less than 200 m from any Site being used for a public library, or for public or private education at the time of the application for the Development Permit for the Cannabis Retail Sales. For the purposes of this subsection only:
>
> a. the 200 m separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measured from Zone boundaries or from the edges of structures;
>
> b. the term "public library" is limited to the collection of literary, artistic, musical and similar reference materials in the form of books, manuscripts, recordings and films for public use, and does not include private libraries, museums or art galleries; and
>
> c. the term "public or private education" is limited to elementary through to high schools inclusive only, and does not include dance schools, driving schools or other Commercial Schools.

[56] Using the Site to Site method of the measurement specified in section 70(2)(a), the Development Officer determined that the distance between the Subject Site and the closest point of the boundary of the School Site is 199.07 metres.

[57] Section 70(4) provides: "Notwithstanding Section 11 of this Bylaw, a Development Officer shall not grant a variance to subsection 70(2) or 70(3)". Therefore, the Development Officer denied the application.

[58] At the start of submissions, the Appellant agreed with this determination and dropped its first ground of appeal - that the distance is in fact 200 metres. The Board finds that the Development Officer's calculation is correct and a variance to section 70(2) of 1.0 metres is required.

[59] While the Development Officer cannot grant this variance, the Board may do so in accordance with section 687(3)(d) of the *Act*. The parties cited two Court of Appeal decisions which provide direction regarding the Board's authority to grant the required variance.

[60] The first case, *Newcastle Centre GP Ltd v. Edmonton (City)*, 2014 ABCA 295, involved the Board's authority to grant a variance to a required separation distance between two liquor stores in a zone where that type of development was a Permitted Use.

[61] Contrary to the written submission of Representatives of Item 9, the Board notes that in *Newcastle*, the Court of Appeal ruled that it is an error for the Board to assume, without any evidence, that the *Bylaw* creates a presumption of harm to the public or that the

Board cannot intervene and grant variances unless that presumption is rebutted by an applicant (at paras 6-7).

[62] After making that conclusion, the Court of Appeal continued on to discuss the Board's obligation to provide reasons when it denies variances, stating (at paras 11-12):

> [11] Were the Board's Reasons adequate? Was the result of applying the proper tests in s 687(3)(d) so obvious as to require no explanation in the Reasons? No. It is not self-evident that or how two liquor stores within 500 meters would interfere with neighbourhood amenities, nor that or how they interfere with or affect use, enjoyment, or value of neighbouring pieces of land. This is not a boiler factory in a residential neighbourhood. The problem only arises because there would be two liquor stores in the area. One alone is a permitted use.
>
> [12] Therefore, if there is any interference with neighbourhood amenities, or with use, enjoyment, or value of other land parcels, the Board had a duty to explain that in its Reasons, and it did not. A mere conclusory statement does not suffice, and that is all that paragraph 10 is.

[63] Second, in *Thomas v Edmonton*, 2016 ABCA 57, the Court of Appeal addressed the Board's authority to waive the requirement for public consultation under the Mature Neighbourhood Overlay. In the course of that decision, the Court of Appeal also commented more generally upon the Board's power to vary development regulations:

> What then is the rationale for this exception? Statutory plans and land use bylaws set out general development standards that are common to all lands in a specific area. These standards are typically defined with precision so that everyone understands what a particular site can be used for, and what can be constructed thereon. But as with all line-drawing, it is recognized that there will be cases in which a strict application of the set standards could lead to an unreasonable result. To relieve against hardship, the Legislature has conferred on subdivision and development appeal boards the authority to relax – that is vary, dispense with or waive – development standards in the applicable land use bylaw providing certain conditions as set out in s 687(3)(d) are met. (at para 29)

[64] As noted by the counsel for the Development Authority, the Court of Appeal also provided a caution against over-extending the authority to allow variances:

> Section 687(3)(d) constitutes an exception to the general rule requiring that the SDAB comply with the *Zoning Bylaw*. While the specific overtakes the general, as is usually the case with exceptions, the exception under s 687(3)(d) of the *Act* should not be interpreted so as to defeat the SDAB's general obligation under s 687(3)(a.1) to comply with the *Zoning Bylaw* which the exception modifies. An exception may pre-empt the general theme of the law. Indeed, that is its purpose.

> But logically it should only do so as precisely as the legislators intended. (at para 16)

[65] The Development Officer did not appear at the hearing, but did provide written materials. In his written report, the Development Officer acknowledged that the proposed development is a Permitted Use. He made no arguments with respect to the impacts of Cannabis Retail Sales Use generally and merely indicates that a variance of approximately 1 metre is required without further comment or evidence to suggest that this particular variance will cause a negative impact.

[66] In the legal brief submitted to the Board, the Counsel for the Development Authority indicates that they do not oppose the Board's exercise of discretion in a reasonable fashion, but argue that the Board should be cautious because the enacted setbacks reflect the concerns of the community and because the impacts of Cannabis Retail Sales Uses are not yet known. The brief does not provide any additional comment or evidence with respect to the impact of the 1.0 metre variance to separation distance required in this particular case.

[67] Representatives from Item 9 attended the hearing to present their written submission and supporting documents and also to speak in opposition to the appeal on behalf of themselves and their landlord who owns a property across Whyte Ave to the north. While the Board notes that this property is outside the 60 metre notification zone, it is in fact 67 metres from the Subject Site and the Board elected to hear from these opponents of the permit.

[68] Item 9 Representatives raised a series of objections to the proposed Cannabis Retail Sales Use. The Board considered each one in turn.

[69] The Board found that many of these objections had little if any relevance to the required variance at issue in this appeal:

a) Item 9 Representatives stated that they have a pending application for a competing Cannabis Retail Sales Use to be located across Whyte Avenue to the north. Part of their motivation for speaking in opposition to the appeal is the fact that given their relative placement in the Expression of Interest Lottery employed by the City to evaluate and approve these Uses, their own proposed location will no longer be fully compliant and available of right per Section 642(1) of the *Act* if the Appellant's application is approved. The Board notes that its task in this case under section 687(3)(d) is to determine the impact of the required 1.0 metre variance for the proposed Permitted Use. The Board finds Item 9's concern to be unrelated to the potential impacts of the required variance at issue in the current appeal.

b) They argue that the appeal should be refused because the Appellant's made some misstatements to Council during hearings about the Expression of Interest Lottery and also should have exercised more diligence to find a fully compliant location that could be approved as a Class A permit. Issues concerning the submissions to Council

about a potential lottery process and the Appellant's veracity or diligence in choosing a prospective location are not relevant to this appeal and have not been given any weight.

c) Item 9 Representatives argued that they will experience hardship due to their placement in the lottery as they executed a 5 year lease in anticipation of approval of a fully compliant Permitted Use development. The Board notes that Item 9's application is not under appeal before it. Further, the potential loss of income or private issues between Item 9 and its landlord arising out of the terms of their contractual arrangements have no relationship to the planning impacts associated with the required variance. The Board did not take Item 9's lease or business plans into account in making its determination.

d) One of the central arguments advanced by Representatives of Item 9 is that the Appellant is a national chain and therefore will have a negative impact on this area as opposed to Item 9 which, as a local business, will improve the amenities of the area. The Board has not given any weight to this argument for two reasons. First, the Board regulates Uses, not Users. Development permits are issued and flow with land - they are not restricted to any particular owner. Second, the Representatives for Item 9 provided no evidence to support their opinion about the relative advantages and impacts of local versus non-local businesses.

[70] The Board also considered the letters of objection collected and submitted by Item 9 Representatives:

a) Item 9 provided several signed one-page form letters from people associated with the Child Care Services Use recently approved on the block face and from other nearby commercial business owners. The Board carefully reviewed these form letters and notes that the main objection once again is that the Appellant is a national large corporation and not a small local business. The letters do indicate that "The national, large, corporation's proposed Site is too close to an elementary school contrary to the requirements of the City of Edmonton bylaw", however they do not mention that the actual variance is less than one metre or specify a harm. Further, the Item 9 Representatives noted that the individuals who signed these form letters were in support of Item 9's Cannabis Retail Sales Use which is to be located less than 70 metres from the Subject Site and that mainly this support for their business was due to the local ownership of Item 9.

b) The Executive Director of Edmonton French Quarter Business Association also supported Item 9's application as it would be fully compliant, had engaged the local business community and was locally owned and operated. The author notes they have had no contact with the Appellants and provides no comment on the 1.0 metre variance.

The Board gave these letters little weight as they did not address the impact of the variance and also stressed the issue of the type ownership of the competing businesses,

which the Board has indicated is not a relevant consideration. It is not the role of the Board to assess the relative virtues of the appellant/applicants versus the prospective applicants, it is tasked to assess the impact of the a variance allowing the proposed Permitted Use to be located 1.0 metres closer to the School Site than the minimum than the *Bylaw* allows.

[71] Based on the evidence provided by the Appellant, the Board finds that the proposed 1.0 metre reduction in the minimum separation distance required between the School Site and the Subject Site is unlikely to have any material impact on surrounding properties or the amenities of the area:

a) The proposed development is effectively two steps shy of full compliance. The size of a variance is not always indicative of its impact. However, the Board accepts the Appellant's argument that in this case a variance of 0.93 metres or two steps is *de minimis*.

b) The Representatives of Item 9 argued that the proposed Cannabis Sales Use should be denied because of the recently approved Child Care Services Use located on the block face and because children may be exposed to cannabis use in the rear lane as they come from the school to the Child Care Services Use and as they pass the Cannabis Retail Sales Use on route to the off-site parking spaces approved for the Child Care Services Use. The Board disagrees for several reasons. First, there are no separation requirements for Child Care Services, which unlike Cannabis Retail Sales, is a Discretionary Use under the applicable *Bylaw* provisions. Second, all children passing the Cannabis Retail Sales Use will be accompanied by either their parents or child care staff if they are in transit to the school. Third, Item 9 representatives were unable to say and it is hard for the Board to conceive how two more steps between the school Site and the Cannabis Retail Sales Use would be materially different in terms of exposure. Fourth, based on the materials before the Board in this appeal, it is speculative to assume legal or illegal smoking will increase markedly in the rear lane. Further, the Board heard evidence that the owner of the proposed development has a business interest in addressing the issue of smoking in the rear lane which may result in an overall reduction in smoking near the proposed development.

c) The actual walking distance from the Subject Site to the School Site is 272.3 metres as opposed to the 199.07 metres distance "as the crow flies".

d) There is no visibility from the school boundary to the proposed development due to intervening commercial and residential buildings.

e) The Subject Site is located in an existing building in a small walkable commercial area straddling Whyte Avenue immediately west of 96 Street which has been identified by Council as an appropriate area for the type of development that has been proposed.

[72] For these reasons, the Board finds that the proposed development will not unduly interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

[73] On a final note, at the oral hearing on October 24, 2018, the Appellants and the Representatives of Item 9 both stated that they wished to proceed. However, Counsel for the Appellant indicated that they would keep the Board apprised of a concurrent judicial application initiated by Item 9 for an order of *mandamus* compelling the Development Authority to issue a development permit for a Cannabis Retail Sales Use at Item 9's site.

[74] The hearing of this appeal concluded on October 24, 2018.

[75] The Board was subsequently informed that the Court of Queen's Bench refused the application for *mandamus* on October 31, 2018 on the basis that it was premature as the Development Officer is entitled to wait 40 days to render a decision (the period expires on November 20, 2018) and that, in the absence of a decision after that date, Item 9 will have the right to appeal the deemed refusal to the Board.

[76] Given the arguments advanced on behalf of the Appellant in the Queen's Bench application, Counsel for Item 9 now argues that its vested right to a permit is a factor that must be considered in deciding the current appeal (Fire and Flower's Appeal) and that this Board ought to either: adjourn this appeal until the outcome of Item 9's eventual appeal is known; or, dismiss this appeal because no evidence was received to support a variance to the 200 metres separation distance from Item 9's site and parties did not receive notice of this additional variance.

[77] The Board declines Item 9's requests.

[78] The Board's authority to hear appeals from decisions of the Development Officer is set out in the *Act* and subject to the specific restrictions and conditions therein with respect to the grounds of appeal and prescribed timelines.

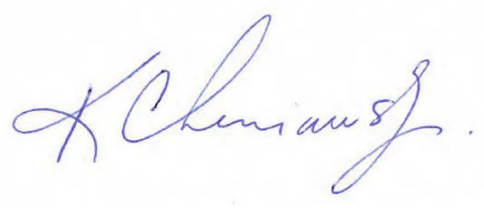
[79] Fire and Flower's grounds for appeal were triggered per section 685(2) of the *Act* by the Development Officer's decision to refuse development permit number 287111261-001 for a Cannabis Retail Sales at the Subject Site.

[80] Sections 686 and 687 prescribe various time lines and conditions applicable to this appeal. One of the conditions set out in the *Act* is the Board's mandatory obligation pursuant to section 687(2) which provides "The subdivision and development appeal board must give its decision in writing together with reasons for the decision within 15 days after concluding the hearing."

[81] The Board finds that there is no statutory basis to ignore section 687(2) or vary it by granting what amounts to an adjournment or stay pending the outcome of a potential future application for another development (Item 9's potential appeal).

[82] Item 9 has every right to make the vested right argument and any other argument it chooses should its permit application proceed to an appeal before the Board. However, any appeal commenced by Item 9 is a separate matter which will be evaluated on its merits in accordance with the *Act* in the normal course. Item 9's potential arguments in a separate possible future appeal do not permit this Board to defer the production of written reasons as required by section 687(2) of the Act for Fire and Flower's current appeal.

[83] The Board further notes that at the commencement of the oral hearing, representatives for Item 9 withdrew their prior request that the Board adjourn the Fire and Flower appeal. They provided extensive submissions at the Board hearing about the proposed development, its potential impact on their pending application and the variance to section 70 as the judicial application was simultaneously proceeding. Based on the evidence of all the participants at the time, there were no approved Cannabis Retail Sales located closer than allowed to the proposed development. That situation has not changed.



Kathy Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board Members In Attendance:
R. Handa, A. Nagy, A. Bolstad

cc: Development & Zoning Services – I. Welch / H. Luke
City of Edmonton Law Branch – M. Gunther
Item 9 Inc.
J. Agrios – Kennedy Agrios LLP
K. Wakefield / O. Oladipo – Dentons
T. Jamison / D. Parenteau - Fire and Flower

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

2. Obtaining a Development Permit does not relieve you from complying with:

    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
    d) the requirements of any other appropriate federal, provincial or municipal legislation,
    e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.

3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.

5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.

EDMONTON
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Vicky's Homes
#501, 14032 - 23 Avenue NW
Edmonton AB T6R 3Z6

Date: November 8, 2018
Project Number: 258185317-005
File Number: SDAB-D-18-172

Notice of Decision

[1] On October 24, 2018, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on September 25, 2018. The appeal concerned the decision of the Development Authority, issued on September 25, 2018, to refuse the following development:

> Construct exterior alterations to a Single Detached House (additional driveway)

[2] The subject property is on Plan 1424124 Blk 14 Lot 91, located at 4131 - Cameron Heights Point NW, within the RSL Residential Small Lot Zone. The Cameron Heights Neighbhourhood Structure Plan applies to the subject property.

[3] The following documents were received prior to the hearing and form part of the record:

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer's written submissions;
- The Appellant's written submissions; and
- Online responses.

[4] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A – Summary of Community Consultation and two more signatures in support

Preliminary Matters

[5] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

[6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[7] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*Municipal Government Act*").

Summary of Hearing

i) Position of the Appellant, Ms. V. Kujundzic, Vicky's Homes

[8] Ms. Kujundizic is the home owner as well as the builder of the subject property. She has chosen this location as her personal primary residence as the developer will allow a taller garage (the "trailer garage") to be built that will fit a trailer. She has a work truck with a 17 foot long trailer that she wants to park in the garage.

[9] Due to an error on the original plot plan, the second driveway leading to the trailer garage was not shown. The City approved the house with two forms of garage access; therefore, it is obvious that there needs to be some way to access the trailer garage. When the second driveway was added to the plot plan and submitted for a development permit, it was refused.

[10] The City suggested that they access the trailer garage door from the side driveway and that concrete be poured across for access. This is not feasible as the turning radius would be too tight to enable her to get the trailer into the garage.

[11] She disagrees with the Development Officer's statement that allowing the variance would unduly interfere with or affect the use, enjoyment or value of neighbouring properties. She referred to her photo submission confirming that a number of houses in the immediate area also have two driveways. One house five doors down has exactly the same configuration as what she is proposing. Her house would not look out of place at all if it had two driveways.

[12] She spoke to as many people as possible within the notification area. There are still many empty lots in the area, a number of them are owned by her company and, two of the owners have been away for weeks and could not be reached. Ms. Kujundizic submitted two more signatures in support of the proposed development as well as documentation of the community consultation she had conducted (Exhibit A).

[13] She provided the following responses to questions from the Board:

i) The driveway would be the width of the single garage.

ii) She suggested some different options for changes to the landscaping but the Chair clarified that the Board does not negotiate changes and is looking at the application that is currently before them.

iii) The house is partially built. The structure is there and it is currently at the rough-in stage.

iv) She confirmed that she has a Development Permit for the house with a four car garage on the side as well as the single trailer garage in the front. They need the room to park her work truck and trailer, store building supplies as well as to park her husband's personal and company vehicles. The trailer is too high to fit into the side garage and she does not want to create an eye sore for the neighbours by parking it on the street. She does not have a shop where it can be parked as they work out of show homes.

v) Curb crossings was not raised as an issue by the City. She showed that all of the similar driveways in the area just use the rolled curb as access.

vi) The driveway is very long and a vehicle can easily be seen exiting the garage by pedestrians. As a mother of three, safety is a concern to her as well.

vii) There is ample street parking in the area as the majority of homes have multiple garages. None of the neighbours she consulted voiced any concerns about a negative impact on street parking. There would still be sufficient room to park a vehicle on the street between the two driveways.

viii) She has read the recommended conditions of the Development Officer and has no issues with any of them.

ix) While there is no Community League that covers the subject area, she did reach out to the Community League located in the other part of Cameron Heights; no response was received. There is no Home Owners Association in this area.

x) Only one of the houses in the submitted photos with an existing double driveway was built by her company.

ii) Position of the Development Officer, Mr. J. Folkman

[14] The Development Authority was not in attendance at today's hearing and the Board relied on Mr. Folkman's written submission.

Decision

[15] The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED as applied for to the Development Authority, subject to the following CONDITIONS:

1. This Development Permit does not include approval for a Home Based Business. A separate application must be made for a Home Based Business Development Permit.

2. Absolutely no parking is allowed within the required front yards/setbacks. (Reference Section 54.2 of the *Edmonton Zoning Bylaw No 12800*)

3. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the *Edmonton Zoning Bylaw*. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the *Edmonton Safety Codes Permit Bylaw* or any caveats, covenants or easements that might be attached to the Site.

4. Lot grades must match the Engineered approved lot grading plans for the area. Contact Lot Grading at 780-496-5500 for lot grading inspection inquiries.

[16] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:

1. Section 54.1(4) is waived to allow for the Driveway size and configuration shown in the approved Plot Plan for the subject site in the RSL Residential Small Lot Zone.

Reasons for Decision

[17] Single Detached Housing is a Permitted Use in the RSL Residential Small Lot Zone.

[18] This subject development application is for an additional driveway to serve an existing overhead door that is attached to the approved front attached garage.

[19] The Board finds that the proposed development would meet the Board's test under Section 687(3)(d) of the *Municipal Government Act* for the following reasons:

i) The Appellant provided evidence that many neighbouring properties had developments of similar configurations (including two separate front access driveways) which suggests that this type of development is consistent with the neighbouring parcels of land and the character of the nieghbourhood.

ii) Moreover, this consistency suggests that the development would not unduly interfere with the amenities of the neighbourhood. The proposal is consistent with the streetscape on the side of the road where the subject premises is located.

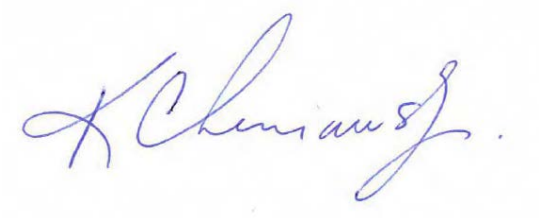
iii) Furthermore, the Board heard evidence that ample street parking is available along the flanking side lot lines of the two properties located across the street and that in this neighbourhood street parking was not common given the abundance of parking in garages and driveways. No concerns were raised by neighbours regarding the impact the proposal would have on the availability of street parking.

iv) The Appellant provided evidence of community consultation and obtained support from several neighbouring parcels within the 60 metre radius. This suggests there would be no material interference or effect on the use, enjoyment or value of neighbouring parcels of land.

v) The original development permit for the house contemplated the existence of an overhead door leading to the trailer garage. While there was an error on the plot plan as it failed to indicate the driveway, the original dwelling application implied that vehicular access would occur from the street. The Appellants indicated that the City suggested adding a paved area along the front yard in front of the attached garage to connect the trailer garage overhead door access to the existing driveway. The Board notes that this type of access may comply with section 54; however, it would have substantially the same visual impact from the street. Furthermore, it would eliminate the majority of greenspace indicated on the submitted plans and the Board accepts the Appellant's submission that this configuration would also create challenges for maneuverability and potentially add to conflicts with passing pedestrians. Given the circumstances, a second direct access may have less negative impacts.

vi) The Board was presented with no objections whatsoever from any of the affected parties.

[20] In consideration of the foregoing the Board grants the development as applied for, subject to the conditions noted above.



Kathy Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board Members In Attendance:
R. Handa, C. Buyze, A. Nagy, A. Bolstad

CC: Development & Zoning Services – J. Folkman / A. Wen

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

2. Obtaining a Development Permit does not relieve you from complying with:

    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
    d) the requirements of any other appropriate federal, provincial or municipal legislation,
    e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.

3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.

5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.